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No. 73

# Supreme Court of the United States

OCTOBER TERM, 1950

PHILLIPS PETROLEUM COMPANY, a corporation,
*Appellant,*

VERSUS

THE STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, PEERLESS OIL AND GAS COMPANY, a corporation, COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and CITIES SERVICE GAS COMPANY, a corporation,
*Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

## BRIEF OF APPELLANT

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October, 1950

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No. 73

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PHILLIPS PETROLEUM COMPANY, a corporation,
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VERSUS

THE STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, PEERLESS OIL AND GAS COMPANY, a corporation, COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, and CITIES SERVICE GAS COMPANY, a corporation,
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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

## BRIEF OF APPELLANT

### OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported in 220 Pac. (2d) 279. It has not as yet been reported in the official Oklahomaa Reports. It appears in the record at pages 895 to 927.

### JURISDICTION

The judgment of the Supreme Court of Oklahoma herein appealed from was entered on the 17th day of January, 1950 (R. 895). Petition of Appellant for rehearing (R.

928) was timely filed and was denied March 21, 1950 (R. 944). Petition for appeal to this Court (R. 945) was presented to the Chief Justice of the Supreme Court of Oklahoma and allowed April 7, 1950 (R. 952).

The jurisdiction of this Court rests on 28 U. S. C. 1257 (2),

The Supreme Court of Oklahoma is the highest court of said state. The decision or judgment appealed from is in favor of validity of statutes of the state the validity of which was and is drawn in question on the ground of being repugnant to the XIV Amendment to the Constitution of the United States.

## STATUTES INVOLVED

The statutes of the State of Oklahoma the validity of which is involved are as follows:

(a) Order No. 19514 (R. 11) of the Corporation Commission of Oklahoma dated December 9, 1946, which provides:

"ORDER

"It Is Therefore Ordered by the Corporation Commission of the State of Oklahoma as follows:

"1. That no natural gas shall be taken out of the producing structures or formations of the Guymon-Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch.

"2. This order shall be effective as of January 1st, 1947.

"Done and Performed by the Corporation Commission at its office in the Capitol Office Building, Oklahoma City, Oklahoma, this 9th day of December, 1946."

The Supreme Court of Oklahoma in the judgment appealed from held that said order is "legislative in character" and subject to the rules and principles "by which the validity of statutes are determined 916). A legislative order of a state administrative b ty, such as the Corporation Commission of Oklahoma, is "a statute" of a state within the meaning of the statutes of the United States, giving the Supreme Court jurisdiction on appeal where there is drawn in question "the validity of a statute of any state"; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100, 103-114; *Sultan Railway and Timber Co.* v. *Department of Labor and Industries of the State of Washington*, 277 U. S. 135, 136; *Albert W. Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 257-258; *Live Oak Water Users Association* v. *Railroad Commission*, 269 U. S. 354, 356.

(b) Chapter 197 of the Oklahoma Session Laws of 1915, being Sections 236 to 247, Title 52, Oklahoma Statutes, 1941, insofar and to the extent that said statute is held to authorize said Corporation Commission Order No. 19514. Said act in general authorizes the Corporation Commission of Oklahoma to regulate the production and taking of gas in Oklahoma so as to prevent waste, protect the rights of the public and of those having a right to produce from a common source of supply within the state. The pertinent section held by the Supreme Court of Oklahoma (R. 905-916) to authorize said Order No. 19514 is Section 4, Title 52, O. S. 1941, 239, namely:

"§ 239. *Common source of supply—Excess gas supply—Apportionment and regulation to prevent waste*

"Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another. (Laws 1915, ch. 197, § 4.)"

"Waste" as used in said statute is a term defined by Section 2 thereof, Title 52, O. S. 1941, 237, to mean:

"The term waste, as used herein in addition to its ordinary meaning, shall include escape of natural gas in commercial quantities into the open air, the intentional drowning with water of a gas stratum capa-

ble of producing gas in commercial quantities, underground waste, the permitting of any natural gas well to wastefully burn and the wasteful utilization of such gas."

## STATEMENT OF CASE

The Guymon-Hugoton Gas Field in Texas County, Oklahoma, is a part of a much larger field which extends not only north and south across all of said county but also into Kansas on the north and Texas on the south (R. 88, 508; see map, Exhibit 68, R. 636A).

The Corporation Commission of Oklahoma by the order complained of prohibits the production from and after January 1, 1947, of any gas from the Oklahoma portion of the field "at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute per square inch" (R. 11, 18).

Appellant is a substantial producer of gas in said field. At the time of the hearing herein it owned oil and gas leases on 183,000 acres of land in the Oklahoma portion of the field (R. 826) on which it had drilled 85 wells (R. 827) from which the allowed production of gas under the then orders of the Corporation Commission was 45 million cubic feet per day (R. 827) measured on a 14.65-pound pressure base (R. 831, 832). In addition, it owned leases on many thousands of acres of land in the Texas portion of the field on which it had drilled 110 wells (R. 831) from which it was producing approximately 86 million cubic feet of gas per day measured on a 14.65-pound

pressure base (R. 832). Said leases are more or less concentrated in the most southerly portion of Texas County, Oklahoma, and the northern part of Sherman and Hansford Counties, Texas.

Except for a negligible quantity of gas sold as an accommodation to another producer for the drilling of two wells, Appellant sells none of its gas at the wellhead or elsewhere in the State of Oklahoma (R. 827, 830, 831). As a means of providing itself with a market for the gas from a part of its acreage, Appellant in 1943 made and entered into a contract with Panhandle Eastern Pipe Line Company for the sale to it for the life of Appellant's leases of the residue gas (the gas remaining at the conclusion of gathering and processing for natural gasoline and other liquid hydrocarbons) from gas produced from approximately 115,000 acres of the leases in Oklahoma and approximately 60,000 acres of the leases in Texas after the same has been gathered and processed by Appellant for the extraction of its gasoline and other liquid hydrocarbon content (see original and supplemental contracts, R. 861-894). The contract further provides for the dehydration and other purification of the gas by Appellant (R. 873, 880, 888, 891). For such residue gas Panhandle Eastern Pipe Line Company agreed to pay 4¢ per thousand cubic feet for the first five years after first delivery under the contract, 4½¢ for the next five years, 5¢ for the next five years, with provision (a) for arbitration of the price thereafter if not mutually agreed to, (b) for escalation of the price during any period of abnormal inflation or deflation, and (c) a reduction in price for any gas having a heating value of less than 975 British thermal units

per cubic foot (R. 880, 881). A supplemental contract dated March 18, 1946, provided for an increase in the price if at the request of Panhandle Eastern Pipe Line Company the gas was enriched by Appellant over and above 973 British thermal units per cubic foot (R. 893, 894). All measurements under the contract, including the measurement of volume in respect to price, are on a 16.4-pound pressure base (R. 883).

Pursuant to its contract with Panhandle Eastern Pipe Line Company Appellant by means of an extensive pipe line gathering system gathers the gas from the wells to a central point in Hansford County, Texas, where it is processed in a gasoline plant owned and operated by Appellant for the extraction of its gasoline and other liquid hydrocarbon content (R. 827, 828, 830, 832). The residue gas, less so much thereof as is used for plant fuel, is then dehydrated and delivered to Panhandle Eastern Pipe Line Company under its contract (R. 827-829, 832, 833). The point of such delivery as established under the contract is in Hansford County, Texas, a short distance from the gasoline plant (R. 828). First delivery under the contract was made November 18, 1944 (R. 833). The raw gasoline and other liquid hydrocarbons extracted from the gas, as such, have no market value (R. 844), but are transported by pipe line another fifty or sixty miles to a "central treater" owned and operated by Appellant at Borger, Texas, where by fractionation and other refinement they are broken down into a number of products, principally 26-70 gasoline, butane and propane, some of which are sold and others consumed by Appellant in its

own operations or used in the manufacture by it of other products for use or sale (R. 842-844).

Under the undisputed evidence the value or gross proceeds of such residue gas and liquid products, without any allowance for the cost of gathering, processing, dehydrating, refining, sale or other handling thereof, at the time of the hearing herein was less than the price required by Order No. 19514 to be obtained for the gas in its natural state at the wellhead.

What has thus far been said pertains to Appellant's gas acreage covered by the Panhandle Eastern Pipe Line Company contract. Appellant owns leases on approximately 68,000 additional acres of land in the Oklahoma portion of the field not covered by contract at the time of the hearing.

Mr. F. E. Rice, Vice-President of Appellant, testified that he had occasion to seek markets for other gas of Appellant in the same area and had made a study and was familiar with the available markets for such gas (R. 846); that although he had negotiated for the sale of such gas on the best possible terms he had been unable to negotiate a contract nor did he know of a market that would yield to Appellant a price therefor of 7¢ per thousand cubic feet at the wellhead (R. 846, 847); that to make delivery of its gas to Cities Service Gas Company would require the relaying and reversal of flow of its gathering system at a cost of at least one million dollars (R. 847); that the facilities of Cities Service Gas Company were already loaded and running at capacity. As shown on Exhibit 68 (R. 636A) the lines of Cities Service Gas Com-

pany are in the north half of Texas County, Oklahoma, several miles distant from the acreage of Appellant.

The proceeding before the Corporation Commission of Oklahoma that resulted in said Order No. 19514 originated with the filing of an application by Appellee, Peerless Oil and Gas Company, a producer in another part of the Guymon-Hugoton Field far removed from the leases of Appellant, as sole applicant, against Appellee, Cities Service Gas Company, both a producer and common purchaser of gas, as sole respondent, to require said respondent as a common purchaser to take and purchase gas from Applicant's wells ratably with other wells to which the respondent was connected at a price to be fixed by the Commission and asking that "In fixing the price of said natural gas" the Commission "fix *the price to be paid by all purchasers* in the field" (R. 31, 34, emphasis supplied). During the course of the proceeding the Appellee, Commissioners of the Land Office of the State of Oklahoma, owner of land in the field, intervened on the side of the Applicant, asking "that said rate and price be fixed as 'in the sands and in the common reservoir before being removed' in order to circumvent wanton economic waste" (R. 171, 177).

Although it had notice of the filing of said application and of said petition of intervention, Appellant not being either a seller or a purchaser of gas in the field, having no dispute or problem with anyone regarding the sale, purchase or price of its or anyone else's gas, the amount of the allowed production from its wells being fixed by other orders of the Corporation Commission (Order No.

17867, R. 535, and the monthly allowable orders issued pursuant thereto), and no question ever having been raised regarding its taking and use of its own gas, did not consider itself involved and did not in any way take part in the hearing or other proceedings before the Commission leading up to Order No. 19514. As further disclosed by the record, no other producer, except the Applicant, Peerless Oil and Gas Company, and the Respondent, Cities Service Gas Company, and no other purchaser, except the Respondent, Cities Service Gas Company, appeared or took any part in such proceeding.

As a result of such proceedings the Corporation Commission concurrently made two orders: one, Order No. 19515 (R. 19), directed against Cities Service Gas Company requiring it as a common purchaser to take gas from the wells of applicant, Peerless Oil and Gas Company, ratably with other wells to which such purchaser was connected and fixing the price to be paid therefor; the other, Order No. 19514 (R. 11), not directed against purchasers but against producers generally, prohibiting the production of gas "at a price, at the wellhead, less" than that prescribed by the order.

Although Order No. 19515 in part contains the same objectionable language as does Order No. 19514, yet the Commission in its brief in the court below having made it clear and the Supreme Court having determined that said Order No. 19515 was in fact an order applicable only as between Peerless Oil and Gas Company and Cities Service Gas Company and not a general order, separate con-

sideration thereof is not material to Appellant's appeal to this Court.

Appellant's first appearance in the proceeding was by application filed with the Corporation Commission on January 17, 1947, to vacate said Orders Nos. 19514 and 19515 insofar as applicable to Appellant or, in the event of refusal to so vacate the same, to clarify such orders as applied to gas not sold at the wellhead, which application was entertained and denied by the Commission on February 4, 1947 (R. 853).

The Corporation Commission in avoiding the setting aside or modifying of its orders made a finding (a) "that said orders were meant to prohibit the production of natural gas from the producing formations in said field unless same was sold at a price of 7¢ per thousand cubic feet on the measurement base provided for in said order, if same were sold, but if not sold, that said gas should be utilized and/or sold, that the producer would realize therefrom the equivalent of 7¢ per thousand cubic feet at the wellhead on the pressure bases provided for in Orders Nos. 19514 and 19515" and the Appellant *was then* realizing "the equivalent *OF APPROXIMATELY* 7¢ per thousand cubic feet at the wellhead within the meaning of Orders Nos. 19514 and 19515"; and that (b) therefore "applicant is already complying with Orders Nos. 19514 and 19515" (R. 855, emphasis supplied). The Commission made no formal order modifying said Orders Nos. 19514 and 19515 to conform with its interpretation thereof but by its order simply denies Appellant's "application to vacate" (R. 856, 857).

Appeals were thereupon taken by Appellant direct to the Supreme Court of Oklahoma both from the original Orders Nos. 19514 and 19515 (R. 7, 804) and from the order of the Commission denying Appellant's motion to vacate said Orders Nos. 19514 and 19515 (R. 804), the first such appeal (R. 7) being by way of cross-petition in error in an appeal taken by Cities Service Gas Company from said Orders Nos. 19514 and 19515 (R. 1). The appeals so taken, together with that of Cities Service Gas Company, were consolidated by the Supreme Court of Oklahoma (R. 29) and the one opinion and judgment entered therein sustaining the orders appealed from.

Appellant now appeals to this Court from said judgment of the Supreme Court of Oklahoma on the ground that the orders so held to be valid by the Supreme Court of Oklahoma are repugnant to and violate the XIV Amendment to the Constitution of the United States.

Cities Service Gas Company has taken its separate appeal to this Court in the case of *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, No. 153, October Term, 1950.

The further facts in regard to the arbitrary, unreasonable and confiscatory nature of said Order No. 19514, that it has no reasonable relationship to the object of its enactment, goes beyond the demands of the occasion and imposes unreasonable and unnecessary restrictions upon the business and property of Appellant, can more clearly and best be stated in connection with Point II of the Argument which follows and which deals with such sub-

ject, and to avoid needless repetition have not been detailed in this statement of case.

## SPECIFICATION OF ERRORS INTENDED TO BE URGED

1. The Supreme Court of Oklahoma erred in failing to hold that Order No. 19514 of the Corporation Commission of Oklahoma appealed from in said consolidated cases and affirmed by the judgment therein, as applied to Appellant, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, that does not sell its gas at the wellhead but gathers, processes and elsewhere sells or usefully utilizes the same, deprives Appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States because of being vague, indefinite and uncertain in that it wholly fails to provide, first, whether such a producer is permitted under the order to so gather, process and elsewhere than at the wellhead sell or otherwise utilize its own gas or whether it must sell the same in its natural state to others "at the wellhead" in order to get the prescribed "price at the wellhead", or second, if such taking and utilization by Appellant of its own gas is permitted and it gets no "wellhead price" for the gas, how Appellant can from day to day determine whether or not it is in compliance with the order, a violation of which is by law made the subject of severe penalties (R. 948). Argued under Point I of the Argument.

2. The Supreme Court of Oklahoma erred in failing to hold that Order No. 19514 of the Corporation Commis-

sion of Oklahoma appealed from in said consolidated cases and affirmed by the judgment therein, as applied to Appellant, a producer of gas in the Guymon-Hugoton Field in Texas County, Oklahoma, that does not sell its gas at the wellhead but gathers, processes and elsewhere sells or usefully utilizes the same, deprives Appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States because it is arbitrary, unjust and unreasonable, confiscates Appellant's property, has no reasonable relationship to the objects of its enactment and goes beyond the reasonable demands of the occasion in that as disclosed by the record and proceedings in said consolidated cases (a) Appellant does not now get nor does it have any reasonable means under the order of getting the prescribed "wellhead price" for its gas; (b) that to comply with the order appellant has no alternative other than to shut in its gas wells to its great detriment and irreparable damage; (c) that if the order denies to Appellant the right to take and use its own gas or if it requires Appellant to sell the same to others at the wellhead in order to get the prescribed price, it is for that reason alone arbitrary and capricious; (d) the order discriminates between producers having a wellhead market for their gas at the prescribed price and the Appellant which does not have such a market or means of getting such a price; (e) no waste or threatened waste of natural gas is prevented thereby; (f) no interests of the public are protected thereby; (g) no interests of those having a right to produce from the common source of supply are protected thereby; (h) the order does not prevent unreasonable discrimina-

tion between separate common sources of supply of gas but on the other hand results in such discrimination; (i) the purported objects to be accomplished by such order could more readily and more reasonably have been accomplished and dealt with in a direct and more effective way; and (j) enforcement of the order against Appellant will be confiscatory of its property, having a value of many millions of dollars (R. 949). Argued under Point II of the Argument.

5. The Supreme Court of Oklahoma erred in failing to hold that Chapter 197 of the Oklahoma Session Laws of 1915, being Sections 236 to 247, Title 52, Oklahoma Statutes 1941, to the extent that said law was held to authorize Order No. 19514 of the Corporation Commission of Oklahoma, deprives Appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the same reasons that said Order No. 19514, held to be authorized thereby, violates said constitutional limitations as stated in Assignment of Error 1 above set out (R. 950-951). Argued under Point III of the Argument.

6. The Supreme Court of Oklahoma erred in failing to hold that Chapter 197 of the Oklahoma Session Laws of 1915, being Sections 236 to 247, Title 52, Oklahoma Statutes 1941, to the extent that said law was held to authorize Order No. 19514 of the Corporation Commission of Oklahoma, deprives Appellant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the same reasons that said Order No. 19514, held to be authorized thereby, violates said constitutional limitations

as stated in Assignment of Error 2 above set out (R. 951). Argued under Point III of the Argument.

## QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

The assignments of error intended to be urged embrace a concise and clear statement of the questions presented and summary of the argument.

## ARGUMENT

### Point I.

**Order No. 19514 deprives Appellant of its property without due process of law in violation of Section 1 of the XIV Amendment to the Constitution of the United States because of being vague, indefinite and uncertain. (Assigned Error 1.)**

The Supreme Court of Oklahoma in the judgment appealed from held that the order complained of "is legislative in character" and subject to the rules and principles "by which the validity of statutes are determined" (R. 916). Such is the general holding of this Court with respect to legislative orders of state administrative bodies such as the Oklahoma Corporation Commission. *Grand Trunk Western Railway Co.* v. *Railroad Commission*, 221 U. S. 400; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679; *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100; *Hamilton* v. *Regents of University of California*, 293 U. S. 245; *Midland Realty Co.* v. *Kansas City Power & Light*

Co., 300 U. S. 109; *Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354; *Louisville and N. R. Co.* v. *Garrett*, 231 U. S. 298; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

Section 247, Title 52, Oklahoma Statutes, 1941, being a part of the act (Sections 236-247, Title 52, Oklahoma Statutes, 1941) pursuant to which the Supreme Court of Oklahoma said Order No. 19514 was authorized and made, provides as follows:

> "In addition to any penalty that may be imposed by the Corporation Commission for contempt, any person, firm or corporation, or any officer, agent or employee thereof, directly or indirectly violating the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, in a court of competent jurisdiction, shall be punished by a fine in any sum not to exceed five thousand dollars ($5,000.00) or by imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment."

Section 102, Title 52, Oklahoma Statutes, 1941, being a part of a later and more comprehensive act (Sections 81-135, Title 52, Oklahoma Statutes, 1941) as amended by Sections 86 and 87, Title 52, Oklahoma Statutes Cumulative Supplement 1947, under which the Commission controls and regulates the production of oil and gas and pursuant to the procedural provisions of which the Commission acts in this instance, provides in part as follows:

> "Any person who shall disobey or violate any of the provisions of this Act or any of the orders, rules, regulations or judgments of the Commission issued, promulgated or rendered by it, shall be punished as for contempt. Punishment by the commission in pro-

ceedings as for contempt for disobedience or violation of any provision of this Act or any of its orders, rules, regulations or judgments, issued, promulgated or rendered under the provisions of this Act, shall be by fine not exceeding in amount $5,000, and each day such disobedience or violation shall continue shall constitute a separate and additional contempt, and shall be punished by separate and additional fines each in amount not in excess of aforesaid amount."

Section 19 of Article IX of the Oklahoma Constitution, creating and dealing generally with the powers and orders of the Oklahoma Corporation Commission, provides in part as follows:

"Any corporation failing or refusing to obey any valid order or requirement of the Commission within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense: * * *."

This Court in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, has said:

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

To the same effect see *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518; *United States* v. *Reese*, 92 U. S. 214, 219; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 81-82; *Champlin Refining Company* v. *Corporation Commission*, 286 U. S. 210, 242-243; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239; *Cline* v. *Frink Dairy Company*, 274 U. S. 445, 458; *Winters* v. *New York*, 333 U. S. 507, 515.

Although the question is usually raised in connection with some attempted penal enforcement of the statute or regulation, this Court in *Small Co.* v. *American Sugar Refining Co., supra*, a suit on contract, held that such was not sufficient to distinguish the cited cases. The Court at page 239, 267 U. S., said:

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings."

The pertinent provision (R. 18) of Order No. 19514 simply provides:

> "That no natural gas shall be taken out of the producing structures or formations of the Guymon-Hugoton field in Texas County, Oklahoma, at a price, at

the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch."

What does the order mean as applied to Appellant, a producer who does not sell its gas at the wellhead or in the state, when it says that no gas shall be taken out of the producing formations *"at a price, at the wellhead, of less than 7¢ per thousand cubic feet"*?

Does this mean that an owner and producer of gas cannot produce what is otherwise determined to be its fair share of the total production of the field unless it makes an actual sale thereof at the wellhead?

Does it mean that an owner and producer of gas cannot take and use its own gas for some legitimate useful purpose of its own?

The word *"price"* normally and in its ordinary usage denotes that which is paid by a purchaser to a seller in connection with a sale. *Williams* v. *Hybskmann*, 311 Mo. 332, 278 S. W. 377; *Chicago, K. & W. R. Co.* v. *Parsons*, 51 Kan. 408, 32 Pac. 1083; *Guy* v. *McDaniel*, 51 S. Car. 436, 29 S. E. 196; *Luthy* v. *Waterbury*, 39 Ill. App. 317; *Brooke* v. *Eastman*, 17 S. D. 339, 96 N. W. 699.

Bouvier's Law Dictionary (Rawles 3rd Rev.), Vol. 3 at page 2683, defines "price" to mean: "The consideration in money given for the purchase of a thing." Ballentine's Law Dictionary at page 1009 defines it to mean: "The consideration of a sale, the amount paid or to be paid for the articles furnished by the seller."

Thus to give the word "price" its ordinary and legally accepted meaning, the order would mean that a producer in order to produce his gas and at the same time comply with the order must sell it to someone else, "at the wellhead", and receive therefor a "price", although such producer may itself have need for the gas for identically the same legitimate use as does the purchaser and is thus forced to buy gas elsewhere for his own needs. Such a result would certainly be unreasonable, capricious and absurd and for that reason violative of due process. Yet, grammatically, that is the logical and literal interpretation to be placed on the order. It would be equally absurd to say that a producer must sell his gas "at the wellhead" as it is that he must sell it at all.

The Oklahoma Corporation Commission recognized this ambiguity or absurdity, as the case may be, and the force of what has just been said, and has attempted to explain and justify the order by making the following finding in its Order No. 19702 (R. 853-855) denying Phillips' application to vacate said order:

> "* * * that said orders were meant to prohibit the production of natural gas from the producing formations in said field unless same was sold at a price of 7¢ per thousand cubic feet on the measurement basis provided for in said orders, if same were sold, but if not sold, that said gas should be so utilized and/or sold, that the producer would realize therefrom the equivalent of 7¢ per thousand cubic feet at the wellhead and on the pressure basis provided for in Orders Nos. 19514 and 19515; * * *."

Assuming that the explanation contained in Order No. 19702 of what was intended by the vague, uncertain

and indefinite language of the original order is sufficient to modify the original order, nevertheless said order as thus modified is equally as vague, uncertain and indefinite as was the original order and for that reason is likewise unconstitutional and void in its modified form.

How and by what formula is a producer, such as Appellant, that does not sell its gas at the wellhead in its natural state, to know when it is realizing under the order "the equivalent of 7¢ per thousand cubic feet at the wellhead" at the designated pressure base? The order does not say. Instead it leaves open the widest conceivable inquiry, the scope and result of which no one can forsee. The producer must guess at the standards and procedures it is to adopt in making such determination under penalty of the law if the Commission or some court later determines that it guessed wrong.

The translation of the price received for or the value of gas or its by-products at a point other than the wellhead after gathering, transportation, processing, boosting, dehydration, further refinement and sale, into a "price equivalent" for the gas in its natural state at the wellhead is an uncertain, equivocal and complex accounting problem. Any number of accounting procedures could be used, each resulting in a radically different answer depending upon the factors taken into consideration, the assumptions made and the value attributed to the different factors. "Reasonable men will differ as to their application."

Must Appellant guess at the accounting procedures and assumptions that will comply with Order No. 19514 at the peril of being wrong and violating the order, making

of itself a law violator subject to the penalties thereof? Is each producer at liberty to pick its own procedures, pick the factors to be considered and decide on the weight to be given the assumptions it makes, dependent upon its own desires or advantage? If so, the order is meaningless. Each producer would, in effect, be setting up its own standards and making its own order. The Commission order would have no uniformity of application. Can this be?

The accounting problem is akin to that where a lease provides for the payment of royalty based on the proceeds received or value of the gas at the well but where the gas is sold or utilized elsewhere or, as in the case of Appellant, it is gathered and processed for the extraction of its liquid content and the by-products are sold or utilized elsewhere than on the lease. Such cases hold that the proceeds received or the value of the gas or its by-products elsewhere than at the wellhead are not to be regarded as the proceeds or value of the gas at the well and that in arriving at the proceeds or value of the gas at the well there is to be deducted from the proceeds received or value of the gas or its by-products elsewhere, the cost of gathering, transporting, processing, boosting, refining, sale and other items of cost entering into the proceeds received or value elsewhere or under different conditions than at the wellhead, including a reasonable return on investment. See *Katschor* v. *Eason Oil Co.*, 178 Okla. 634, 63 Pac. (2d) 977; *Armstrong* v. *Skelly Oil Co.* (5 C. C. A., Tex.), 55 Fed. (2d) 1066; *Scott* v. *Steinberger* (Kan.), 213 Pac. 646; *Kretni Development Company* v. *Consolidated Oil Corporation* (10 C. C. A., Wyo.), 74 Fed. (2d) 497; *Wall* v. *United Gas Public Service Co.* (La.), 152 So. 561; *Coyle* v. *Louisiana*

*Gas & Fuel Company* (La.), 144 So. 737; *Voshell* v. *Indian Territory Illuminating Oil Company* (Kan.), 19 Pac. (2d) 456, and *Molter* v. *Lewis*, 156 Kan. 544, 134 Pac. (2d) 404, both involving oil; *Sartor* v. *United Gas Public Service Co.* (5 C. C. A., La.), 84 Fed. (2d) 436; *Hemler* v. *Union Producing Co.* (D. C., W. D., La.), 40 Fed. Supp. 824.

No one of the foregoing cases purports to detail all of the items of cost that could or should be taken into account, nor to lay down any precise rules or standards for the determination thereof. Each case was decided on the basis of what was found by the court or the jury to be fair under the facts and what was contended for in the particular case.

In the case of *Katschor* v. *Eason Oil Company*, *supra*, where the gas was purchased for the extraction of gasoline, the Supreme Court of Oklahoma said the value of the gas at the wellhead may be established "by showing the difference between the sum of the sale price of the gasoline and residue gas and the sum of the cost of manufacture after production, the depletion of the plant, and the cost of marketing said products."

In the case of *Armstrong* v. *Skelly Oil Company*, *supra*, another processing case, the Court said that "shrinkage in extraction and the cost of manufacture, including overhead charges, and a fair return on investment" may be taken into consideration.

Other of the cases refer to "cost of transportation" or "charge for transportation" or "cost of boosting" or "charge for extracting gasoline", etc., dependent upon the nature of the case and the facts involved.

But what constitutes a proper charge for gathering, transportation, processing, manufacture, sale and other operations or services that may enter into the gross proceeds or value of the gas or its by-products elsewhere and under different conditions than at the wellhead? What is a "fair return on investment"? What rate of depreciation in lines and equipment? What method of allowing overhead? The courts lay down no fixed rule. The order in this case does not say.

Let us look at the problem confronting Appellant under the orders appealed from.

It does not sell its gas at the wellhead. By means of an extensive and costly gathering system it gathers and takes its own gas to a point several miles distant in Texas where it is processed in a gasoline plant owned and operated by Appellant for the extraction of liquid hydrocarbons. The processed residue, less so much thereof as is consumed as plant fuel, is then dehydrated and sold. The raw liquids have no market value and are transported another fifty or sixty miles to a central treater owned and operated by Appellant at Borger, Texas, where by fractionation and refinement they are broken down into a number of by-products, principally 26-70 gasoline, butane and propane, some of which are sold and others consumed by Appellant in its own operations or used in the manufacture by it of other products for use or sale. (See Statement of Case, *supra.*)

The first point or points in the course of the foregoing series of operations at which the amount of any "price" or value in money can be attributed to the gas or its by-

products is, insofar as the residue is concerned, at the time of the sale thereof to Panhandle Eastern Pipe Line Company, and in the case of the liquids, at the time they are broken down and further refined into 26-70 gasoline, butane and propane after fractionation at Borger.

Under Order No. 19514 how can Appellant know what it must receive gross for the gas and the processed liquids in order that it may be said that it is receiving an "equivalent of 7¢ per thousand cubic feet" for the raw gas "at the wellhead" on a 14.65-pound pressure base? What costs are to be allowed or charge made for gathering and transporting the gas to the gasoline plant in Texas—½¢, 1¢ or 2¢? What charge is to be made for the maintenance and operation of the gasoline plant in performance of the other operations and services required under its contract as an incident to the sale of the residue gas to Panhandle Eastern Pipe Line Company? Under the contract the gas so sold must be dehydrated, boosted to a certain delivery pressure and must meet certain requirements as to purity. All are special services entering into the price received therefor and for which there is no fixed charge.

What value is to be placed on the gas consumed as plant fuel?

What charge or allowance for costs is to be made for taking the liquids having no commercial value at the gasoline plant to the central treater at Borger and there processing the same?

The market values ascribed to the processed liquids at Borger contemplate a sale thereof. What is to be charged as a proper sales expense?

Under the principles announced in the above cited cases Appellant in figuring such charges or costs would be entitled to include overhead, depreciation and reasonable return on its investment.

How much overhead? What is to be included as overhead? Is it to be on the basis of capital employed or on the basis of services performed? Overhead is defined in 65 C. J. 1161 as "a word of vague content which has recently been introduced in accounting." Yet it is a proper item of cost. *Armstrong* v. *Skelly Oil Company, supra; Fort Dearborn Trust & Savings Bank* v. *Skelly Oil Co.*, 146 Okla. 179, 293 Pac. 557, 563; *Texas Company* v. *Roos* (5 C. C. A.), 43 Fed. (2d) 1, 14.

What depreciation base and rate is to be used? There are many methods of computing depreciation, with varying results, particularly by periods. Among such methods are the straight line method, reducing balance method, equal annual method, production method and others. The reducing balance method v. the straight line method, for instance, for the same period will give a very different answer and give different answers for different periods. The order appealed from applies to g... produced daily and hence the amount of depreciation figured by periods would be material. Other cases holding that depreciation is a proper item of operating cost are *Fairbanks, Morse & Co.* v. *City of Wagoner, Oklahoma* (10 C. C. A.), 81 Fed. (2d) 209, 219 (modified on other grounds, 86 Fed. [2d] 288); *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 90 Okla. 84, 216 Pac. 917, 923; *Springfield Gas & Electric Co.* v. *Public Service Commission of Missouri*, 10 Fed. (2d) 252.

What return on investment is to be allowed? On a several million dollar investment and operation, as in Appellant's case, a variance of ½% or 1% is an important item.

These are all questions of importance concerning which Appellant must, in advance, guess at what answer would constitute an acceptable compliance with the orders. There is no doubt that men of common intelligence can and will differ as to the application of the order in such a situation. This is what this Court in *Connally* v. *General Construction Company, supra,* said "violates the first essential of due process of law."

By what token can the Commission say that a figure "approximating" 7¢ per thousand cubic feet at the wellhead is a compliance with the order? The order says "7¢". What is approximate? With what assurance can a producer guess at what approximate figure will constitute compliance with the order. Suppose that as a result of the calculation aforesaid the answer was 6.512¢ per thousand cubic feet. Would such answer be sufficiently "approximate"?

**Point II.**

**Order No. 19514 deprives Appellant of its property without due process of law in violation of Section 1 of the XIV Amendment to the Constitution of the United States because of being arbitrary, unreasonable and confiscatory, has no reasonable relationship to the objects of its enactment and goes beyond the reasonable demands of the occasion. (Assigned Error 2.)**

To more clearly present the constitutional objections raised under this point it is necessary to first analyze the order complained of, the statements of its objects as defined by the court below, and the facts.

The order is one directed against the producer. The court below said: "The regulation applies to the production of natural gas * * *." (R. 914) It makes no exception with respect to any producer or in respect to any use of the gas. The order is not one directed against the purchaser.

Quoting from the statute under which it held the order was made, Section 239, Title 52, Oklahoma Statutes 1941, the Court stated the objects of the order to be:

(1) The prevention of waste.

(2) The protection of the interest of all those having a right to produce from a common source of supply.

The court further interpreted this object to include the landowner and royalty owners as well as the lessee.

(3) The protection of the interest of the public.

The court, in addition to the conservation of gas, interpreted this object to include the interest of

the sovereign state in the gross production tax revenue measured by the market value or price of the gas.

(4) The prevention of unreasonable discrimination in favor of one source of supply against another.

A brief analysis of the pertinent parts of the evidence on which Order No. 19514 was based is as follows:

The great majority of the evidence consisted of testimony as to the comparative value of the heating content and existing prices of gas in the Guymon-Hugoton Field with that of coal and other fuels and that in the opinion of the witnesses the sale of the gas at a price less than parity with that of such other fuels or for a price less than its so-called intrinsic value for chemical and other special uses constituted "economic waste". It was testified that the heating value of the gas figured on the same basis as that of coal was in excess of 10¢ per thousand cubic feet.

Three witnesses; William D. Weindlein (R. 119-120), a consulting engineer from St. Paul, Minnesota, M. L. Mayfield (R. 163), a gas consultant of Houston, Texas, and Walker T. Pound (R. 282-283), conservation officer for the Corporation Commission, testified that in their opinion there was a relationship between price and the conservation of gas. Neither Mr. Weindlein nor Mr. Mayfield gave any explanation of such relationship or any factual data in support thereof other than a statement by Mr. Mayfield that in his opinion it was fundamental that as things become more valuable there is more effort to conserve them (R. 163). The only example cited by Mr. Pound was that there was some venting of gas in the completion of wells,

which in his opinion would not occur if the price was higher (R. 292-293). When asked to name an amount that had been so vented, he merely answered, "I can name 1,000 cubic feet", and when asked where it was, he merely answered, "Give me one of your wells, and I will tell you" (R. 294). In other words, the volume was only nominal and he knew of no specific instances. Neither Mr. Weindlein nor Mr. Mayfield testified to ever having been in the field.

Aside from the testimony above there was no evidence of any waste of gas in the field. Mr. Pound testified (R. 287):

Q. "There has not been any physical waste has there?

A. I don't know.

Q. Not to your knowledge?

A. The basic Hugoton Order has probably prevented what waste might have occurred. There were many instances in the past, prior to the issuance of the order.

Q. Since that order there has been no waste?

A. I would not say there has been none, there has been less.

Q. Well, I asked you whether there was and is and you said none to your knowledge, now do you want to reconsider?

A. You are talking abou' ac ual physical waste?

Q. Yes.

A. I will say that there is none out there."

In a statement made to the Federal Power Commission on October 9, 1945, shortly prior to the hearing in

this case, he said (R. 472): "Insofar as the physical waste of dry gas is concerned, there is none in Oklahoma."

Mr. L. M. Batten, district superintendent for Cities Service Gas Company, testified at length to operations in the field and the fact that they were conducted in accordance with good and accepted practices (R. 340-353). He said (R. 350-351): "We are trying to operate and save all the gas we can. I don't know whether a price increase—I don't know how it could change it myself." No one testified to the contrary.

A representative of the Oklahoma School Land Commission testified that the School Land Commission owned several thousand acres of land in the field which was leased to different producers and from which it was being paid royalty on the basis of 4¢ and 5¢ per thousand cubic feet of gas (R. 182-184).

The testimony of a large number of other royalty owners was merely to the effect that they wanted more money (R. 112-117).

Mr. M. L. Mayfield, the gas consultant from Houston, Texas, who testified that he had been employed in the case in April of 1946 (R. 257) preceding the hearing in May, and who did not go to the field (R. 218), in answer to a question if he had an opinion as to the cause of the "depressed price" of gas in the Guymon-Hugoton Field, said (R. 162-163):

> "Well, in the early period of its production there natural gas was of little value, since it was just an incident to the search for oil, and they didn't have adequate market facilities. The price paid for it was

little more than a token price and in some instances it was even given away, in order to perpetuate the lease. In the course of development major companies acquired large blocks of acreage and after the discovery of the gas they were forced to seek and secure markets and after the laying of transportation lines and development of the market it has been a very profitable arrangement, due to the large blocks closely held, and the companies were marketing their own gas—lease holders of smaller character and smaller owners, not having financial backing and resource were not even given the opportunity to market their gas,—as a result the price was depressed and has remained depressed throughout the gas industry."

We cite the foregoing statement not that we think it rises to the dignity of evidence but because the Court in its opinion refers thereto as a justification for the order. The witness made no further statement or explanation in regard thereto.

There was no testimony whatever that the fixing of a price a producer must get for its gas has any relation to or affects in any way the correlative rights as between the several producers in the field.

The Corporation Commission long prior to the proceedings in this case, by what was known as the basic field order, established the basis for determination of the fair share of the gas each producer was entitled to produce (Exhibit 9, R. 535). By another order (Exhibit 70, R. 637), known as the state-wide rules, the Commission had enacted rules governing the prevention of waste of oil and gas and the ratable production thereof as applied to all

pools in the state, except to the extent modified by special rules for a particular field.

As stated elsewhere in this brief, there was no evidence of any waste or wrongful practices on the part of Appellant or that the use or other disposition made by Appellant of its gas or by-products thereof was in any way improper.

The foregoing, together with the additional facts stated in the Statement of Case and under Point I of the Argument, fairly summarizes the material facts in the case said by the court below to authorize the order complained of.

Appellant does not contend that the State of Oklahoma in the proper exercise of the police power in the public interest may not itself or through the Corporation Commission reasonably regulate and restrict the production of gas to prevent the waste or wasteful utilization thereof or to protect the correlative rights of the several owners of a common source of supply.

But as has been repeatedly said by this Court, the state may not, under the guise of the police power or the public interest, arbitrarily invade the personal rights and liberties of individual citizens, interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116.

Or as was said by this Court in the case of *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69:

"But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."

It is also the general rule that the exercise of the police power must be for the public welfare or in the public interest, that is, for the benefit or protection of the members of the public or of the community as a group and not for the private gain or benefit of individual members of such group. One person's property may not thus be taken and given to another; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 79; *Great Northern Railway Co.* v. *Minnesota*, 238 U. S. 340; *Missouri Pacific Railway Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Railway Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Railway Co.* v. *Cahill*, 253 U. S. 71; *Citizens Savings & Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1; *Myles Salt Co.* v. *Iberia and St. M. Drainage District*, 239 U. S. 478; *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700.

Order No. 19514 violates all of the principles so stated.

Here presented is a situation where an individual owner and producer of gas, whether from his own lands or lands lawfully leased from others, and otherwise free to produce, sell, use or otherwise dispose of such gas at such price and on such terms as it sees fit, is expressly prohibited from so doing except at the minimum price named in the order. Such right to possess, manage, use, sell or otherwise dispose of its property, together with the right to fix the price and terms of sale is an inherent right

of property subject to the XIV Amendment to the United States Constitution; *Buchanan* v. *Warley*, 245 U. S. 60, 74; *Tyson & Brother—United Theatre Ticket Officers* v. *Banton*, 273 U. S. 418, 429; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116; 11 Am. Jur. 1146, Sec. 335; 16 C. J. S. 1196, Sec. 599.

Before proceeding to a consideration of the named objectives of the order complained of and its invalidity on that account, it should be made clear that it has long been held that the production of gas in Oklahoma is not such an activity or a business so affected with a public interest to be subject to regulation fixing the price for which the producer must sell its gas; *Sterling Refining Co.* v. *Walker* (1933), 165 Okla. 45, 25 Pac. (2d) 312, 320; *Nowata Gas Co.* v. *Henry Oil Co.* (8 C. C. A., Okla., 1920) 269 Fed. 942.

In the case of *Sterling Refining Co.* v. *Walker*, it was said:

> "Petitioners further contend that the act in question is also unconstitutional because it confers upon the Corporation Commission the authority to fix the price of oil, and they further assert that the orders promulgated by the Corporation Commission under the authority of this conservation act were for the purpose of establishing or regulating the price. It has been universally held that, unless a business is so affected with a public interest in the sense that the regulation of the price thereof is essential to the protection of the public, it is beyond the authority of the state or of the nation to regulate the price of the commodity. Businesses warranting regulation by price fixing are usually monopolistic in character. *Williams*

v. *Standard Oil Co.*, 278 U. S. 235, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747.

"The oil and gas business does not fall within this class, and thus legislation for the purpose of establishing or fixing the price cannot properly be enacted. *People's Petro. Producers* v. *Smith* (D. C.), 1 F. Supp. 361."

The holding in the two cases last cited is in accord with the holding of this Court in the case of *Tyson & Brother—United Theatre Ticket Officers* v. *Banton*, 273 U. S. 418, 429; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Ribnik* v. *McBride*, 277 U. S. 350.

It is to be noted that the order in this case does not purport to fix the price a producer must get for its gas for the protection or benefit of the purchaser or the consuming public but, according to the court below, for the individual benefit and protection of the producer and his lessor or royalty owners and state revenue.

Not all the objects and purposes of Order 19514 as interpreted by the court below are within the proper exercise of the police power of the state and none find justification under the facts for their application in this case.

*FIRST—The prevention of waste.* It is conceded that the prevention of the waste of gas is an object within the scope of the police power of the state. Here, however, the facts do not warrant the exercise of the police power on this account.

There was no waste or threatened waste of natural gas. As stated by Mr. Pound, "The basic Hugoton Order has probably prevented what waste might have occurred." The mere statement of opinion unsupported by any facts that there is a relation between the price and the conservation of gas because the more valuable a thing becomes the more apt a person is to conserve it, is but a debatable philosophic statement that does not rise to the dignity of fact or evidence. Where, however, there is no actual waste or threatened waste and the producers are recovering all the gas possible, there is nothing more to be accomplished. Is it reasonable to suppose that producers who have spent millions of dollars to drill and develop their properties and who depend solely upon the gas recovery as the life blood of their investment and business are not going to use every reasonable effort to recover and conserve every foot of gas possible and use or sell it to the best possible advantage? The talk about the venting of gas in connection with the completion of wells is negligible. The state-wide rules of the Corporation Commission regulating the drilling for and marketing of gas all over the state expressly authorize such practice (Exhibit 70, R. 637, 663). If objectionable, it could readily be stopped by a simple order to that effect without upsetting the whole economic structure of the entire field and invading and taking away the inherent property rights of every producer.

There being no actual or threatened waste of gas forced the proponents of the order and the Commission to invent what they have chosen to call "economic waste", defined by them to be the selling by the producer of gas for a price below parity with other fuels or below its value

for some special use. So-called economic waste to the producer is not what the statute or what this Court in the case of *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, and other conservation cases, was talking about in referring to the "waste of gas". We know of no direct public interest in what the owner gets for his gas. If the owner wants to sell it at a price below parity with other fuels or at a price below its value for some special use or if he wants to give it away, that is the right of the individual owner in which the public has no interest, except only where the question of unfair competition, anti-trust laws and the like is at issue, a subject of regulation not here involved. There was no proof that the current market price for gas in the field was below the cost of development and operation so as to force the abandonment of properties. On the other hand, the proof was that the producers were making a profit over and above the cost of recovery. Nor can it seriously be contended that by so increasing the price of gas the order had as a valid object the prevention of its utilization for inferior uses. No one testified that the gas produced in the field was being used for any inferior uses. Instead the record is replete with evidence that it is all going for accepted and recognized useful purposes. Like in the case of the venting of gas, if the object to be accomplished was to prevent the use of gas for certain inferior uses, such objective could more readily and effectively be accomplished by a simple order prohibiting its production for such inforior uses, as was done in the carbon black cases; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Quinton Relief Oil & Gas Co.* v. *Corporation Commission of Oklahoma*, 101 Okla. 164, 224

Pac. 156. The order in the instant case would permit the gas to be used for any purpose the producer or its purchaser cared to use it for, wasteful or otherwise.

That the power of the state to limit and control the production of its natural resources for the prevention of waste is limited to waste of the resource itself and not some economic theory of waste from the standpoint of price was made clear by the Oklahoma Supreme Court in the earlier oil case of *Sterling Refining Co.* v. *Walker*, 165 Okla. 45, 25 Pac. (2d) 312, 321, overlooked by it in its decision of the instant case and wherein it said, in considering a statute that defined waste to include economic waste:

> "The power of the state to regulate, control and limit the production of oil from any common source of supply is for the purpose of preventing physical waste thereof. It recognizes an interest in the state in the conservation of a great natural resource. For the proper accomplishment of this end oil conservation laws may be enacted. But the accomplishment of this end may not be used as a cloak or guise to control the price of oil. Of course, the limitations of the production for the purpose of preventing physical waste may affect the price. However, we do not regard this more or less natural effect as rendering the act in question or the administration thereof invalid. It renders orders objectionable only when and if price fixing is taken into consideration as an element in fixing the amount of allowable production from a common source of supply."

*SECOND—The protection of the interest of all those having a right to produce from a common source of supply.* To the extent that "the protection of the interest of all

those having a right to produce from a common source of supply" means the "correlative rights" of the several owners of different tracts having a corresponding right to produce from the same common reservoir as in the many oil and gas conservation cases coming before this Court, we of course agree that it is an authorized objective within the scope of the reasonable exercise of the police power of the state; *Ohio Oil Company* v. *Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, and the many other such cases.

There was, however, no evidence in this case nor are there any facts here present that would give rise to the order in question on such account. The price which a particular producer gets for his fair share of the gas after it is produced has no relation to the correlative rights of a producer in some other part of the field. For example, it is of no concern to Peerless Oil and Gas Company, a producer in another part of the field, what Appellant gets for its gas after it is produced. The fair share of each in and to the gas to be produced from the reservoir is determined under other orders not here in question.

As a matter of fact, the order is antagonistic to the correlative rights of the several producers of the different tracts in the common source of supply. Under such order the producer of a tract who happens to be fortunate and have a market or use for his gas that will yield to him the price prescribed by the order is allowed to produce such gas whereas the producer who for some reason happens not to have such a market is forced to shut in its wells. The matter of shifting markets from one part of the

field to another is not as simple as it may sound. One trouble with the order in question is that it does not take into account any of the practical, economic or other operating problems of the producer in such a field. Division of the gas on the basis of the price a producer is able or chooses to get is not a recognized or fair basis of distribution.

The court below, however, discusses this particular objective in the sense that it means the rights and interests of the owners of a particular tract to get a desired amount for the gas from that particular tract and the matter of the rights as between such owners. This cannot be and still be within the proper exercise of the police power. For the Commission to make an order to allow the individual owners of the different tracts to in some way get an increased amount of financial gain or to adjust the rights as between the owners of the tract, for example, as between a lessee and a royalty owner, is purely and simply a matter of private interest to and as between such owners and not a matter of public interest necessary to the exercise of the police power. However phrased it would resolve itself into a matter of compelling some private person to pay money to some other private person or the adjustment of private rights, which is invalid as violative of the Federal Constitution; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 79; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri P. R. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern R. Co.* v. *Minnesota*, 238 U. S. 340; *Great Northern R. Co.* v. *Cahill*, 253 U. S. 71; *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182; *Chicago, St. P. M. & O. R. Co.* v. *Holmberg*, 282 U. S. 162; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1; *Myles Salt*

*Co.* v. *Iberia & St. M. Drainage Dist.*, 239 U. S. 478; *Hairston* v. *Danville & W. R. Co.*, 208 U. S. 598, 605, 606; *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 705.

As was said in the case of *Treigle* v. *Acme Homestead Association*, 297 U. S. 189, 197:

> "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Under this same heading the court below talks about possible monopolistic practices existing as between producers and purchasers and thereby depressing the price of gas against which the royalty owner should have protection. In the first place, there was no evidence of any collusion as between any of the producers or as between the purchasers or as between any producer and any purchaser. If such a situation did exist, it might be the proper subject of consideration under the monopoly statutes of the state with resulting action of some kind against those persons engaging in unfair or monopolistic practices and not by an order under the guise of a conservation regulation directed against every producer in the field. Appellant is not a purchaser. It is not engaged in any monopolistic practices in respect to the purchase of gas. It is not the victim of any monopoly. Instead it as a producer owning gas properties set out to establish a use and market for its gas as every other producer in the field had a right to do. If

any of its royalty owners are dissatisfied with what it as a producer does with the gas, the problem is simply one of private contract.

*THIRD—The protection of the interest of the public.* In addition to the interest of the public in respect to the matter of conservation of natural gas, which is fully covered under the first subdivision above, the court below says that the "interest of the public" includes the interest of the sovereign state in and to the revenue derived from the gross production taxes measured by the market value or price of the thing produced. We have been unable to find any case or situation where there has been an attempted exercise of the police power for the purpose of creating an artificial price structure so as to maintain taxes. The absence of such cases would certainly negative the idea that the power exists. If such were not the case there would be no field of private rights or endeavor free from the exercise of the police power.

Nor would the royalty interest of the State School Land Commission constitute a public interest in a sense that would give rise to the exercise of the police power to invade the private rights of private interests for the financial gain of such governmental agency. It is an accepted principle, requiring no citation of authority, that a state body acting in a proprietary capacity has no different standing in respect to private individuals than do other private individuals. For a sovereign power to invade the private rights of others in the interest of the sovereign it does so under the right of eminent domain where compensation is provided for the right so invaded.

*FOURTH—The prevention of unreasonable discrimination in favor of one source of supply against another.* There was no testimony involving the matter of discrimination as between pools that would be corrected by the order in question. As a matter of fact, the Commission in its order made no finding in such regard and did not name this objective as a ground of the order.

Thus the order in question is clearly subject to the evils denounced in the case of *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, wherein this Court struck down as unconstitutional an order of the Texas Railroad Commission purporting to have been entered under the guise of the police power to prevent waste and protect correlative rights and which this Court said in reality was to give certain private interests, namely, producers in the field, an opportunity to appropriate a market established by other individuals, which this Court said was clearly not in the public interest. Here the real objective is not any purpose of public interest justifying the exercise of the police power but is simply an attempted means to give to Peerless Oil and Gas Company, a private person, and a group of royalty owners a greater private return.

The case likewise comes within the principle of the case of *Tyson & Brother—United Theatre Ticket Officers* v. *Banton*, 273 U. S. 418, and the cases therein cited, holding that private persons, such as Appellant in this case, are not subject to price regulation in the absence of some compelling public interest not here existent.

Assuming, however, that all of the objectives named by the court below are within the proper exercise of the

police power and that facts existed that would warrant action under the police power in respect thereto, nevertheless the order in this case is an arbitrary, capricious and unreasonable exercise of that power.

Something is vitally and definitely wrong when all that is required to upset the economic structure of one of the world's largest gas fields, invade the private rights of persons established at the cost of millions of dollars, and provide for a different medium of adjustment of rights between lessees and royalty owners, all as a result of a four-line order embracing but one sentence. No attempt is made to distinguish between producers who have certain markets for their gas and producers who do not or as between the producers first named and a producer that chooses in the exercise of its inherent right of property to utilize its gas in some other way than by the sale thereof either at the wellhead or elsewhere in its natural state.

The order in question does not so much as make an exception for a producer who may want to produce a part of his own gas for use as fuel in the operation of the lease from which it was produced except that it be at the "equivalent" of the prescribed price when, as a matter of fact, there is no way known to the mind of man whereby a producer can pay to himself a price for gas so used.

A most serious objection to the order is that stated in *Tyson & Brother—United Theatre Ticket Officers* v. *Banton*, 273 U. S. 418, 442-443, to the effect that a price-fixing order to cure some evil existing on the part of certain individuals or companies which is made to apply in respect to the

private rights and interests of a class wholly irrespective of the guilt or innocence of the persons affected, is arbitrary and void under the due process clause of the Federal Constitution. The Court in that case said:

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree, in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with — *Com.* v. *O'Brien*, 12 Cush. 84, 90), and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

In this instance the order applies in respect to every producer in the field regardless of his method of operation, regardless of whether or not he is guilty of waste, regardless of whether or not he is a part of any monopoly, re-

gardless of the uses made by him of his gas, all in respect to a legitimate enterprise recognized as valid under other orders of the Commission.

Perchance any of the evils exist which it is claimed are to be corrected by the order, they are all evils that could be corrected by a simple order dealing directly with such evils and affecting only the rights and interests of those who may be guilty.

**Point III.**

**Statutes of Oklahoma, to the extent that such statutes are construed to authorize Order No. 19514, contravene the XIV Amendment to the Constitution of the United States for the same reasons that said order violates said provision of the Constitution. (Assigned Errors 5 and 6.)**

To the same extent and for the same reasons that Order No. 19514 violates the XIV Amendment to the Constitution of the United States, Chapter 197 of the Oklahoma Session Laws of 1915, being Sections 236 to 247, Title 52, Oklahoma Statutes 1941, held to authorize said invalid order, would likewise be unconstitutional and void. Such constitutional objections having been fully presented under Points I and II of the argument above, the same are here applicable and by reference adopted as the argument of Point III.

## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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